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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DURELL LEE CLIFTON, Appellant.	)	2 CA-CR 2010-0334 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900497

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman
Tucson
Attorneys for Appellee

Harriette P. Levitt
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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Durell Clifton was convicted of possession of a narcotic drug for sale with intent to promote, further or assist any criminal conduct by a criminal street gang, and assisting a criminal street gang (Count Six). After finding Clifton had a prior historical felony conviction, the trial court sentenced him to concurrent, presumptive prison terms totaling 14.25 years.[1] On appeal, Clifton argues the court erred in admitting evidence of other acts to prove Count Six and to enhance his sentence for sale of a narcotic drug. He also asserts there was insufficient evidence to support these claims. For the following reasons, we affirm.

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On May 29, 2009, Clifton and his brother/co-defendant Darnell, met an undercover agent from the Drug Enforcement Agency and a confidential informant in a grocery store parking lot to sell them a "bill" ("a hundred dollars . . . worth") of crack cocaine. After Clifton and Darnell arrived in a blue Cadillac driven by Darnell, Clifton entered the officer's vehicle and gave the informant a bag of crack cocaine in exchange for $100. While the sale was taking place, Darnell drove the Cadillac in a manner consistent with counter-surveillance techniques used by those who sell illegal drugs. During a subsequent police interview, Clifton admitted having sold cocaine to the officer and

[1]Pursuant to former A.R.S. § 13-709.02(C) (presumptive sentence for class two felony conviction of "intent to promote, further or assist any criminal conduct by a criminal street gang . . . shall be increased by five years"), an additional five year prison term was added to Clifton's 9.25-year sentence for possession of a narcotic drug for sale. *See* 2008 Ariz. Sess. Laws, ch. 301, § 34. We note the record does not support Clifton's claim he was given "flat time" sentences.

informant. On appeal, Clifton does not challenge his conviction for the drug offense, although he does challenge his conviction on Count Six of the indictment, which charged him with "assisting a criminal street gang, to wit: the 'Hollywood' street gang, by committing any felony offense, whether completed or preparatory, for the benefit of, at the direction of, or in association with any criminal street gang" in violation of A.R.S. § 13-2321(B) and (D), and the imposition of an enhanced sentence on the drug offense.

¶3 At trial, Sierra Vista Police Officer Marco Madrid, who interviewed Clifton in July 2009, testified that when he asked Clifton what "Hollywood" was, Clifton responded that it was a "group of people . . . [that] grew up together . . . [and] hang[] out." Notably, Clifton named various individuals who belong to Hollywood, including Dun-Dun (Darnell), Andrew Mears, Timothy Gunter, Jeffrey DeLoach, and Jomoco DeLoach. State's witness Timothy Gunter testified that Hollywood is a gang, that he previously was a member, and that some of the members he had spent time with were Clifton, Darnell, Scott Cline, and Andrew Mears. He also testified that Hollywood members work together to sell crack cocaine, sharing the proceeds of those sales.

¶4 Sierra Vista Police Officer Jeremy Wolfe identified the seven criteria that define membership in a criminal street gang pursuant to A.R.S. § 13-105(8) and (9).[2]

[2]Section 13-105(8), A.R.S., defines a criminal street gang as "an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member." Section 13-105(9) further defines a criminal street gang member as "an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply: (a) Self-proclamation. (b) Witness testimony or official statement. (c) Written or electronic correspondence. (d) Paraphernalia or photographs. (e)

Wolfe testified that Clifton had described the Hollywood hand symbol, which Wolfe stated resembled "horns," as an "H" that stands for Hollywood. He identified four Hollywood members in one of the photographs admitted at trial, and explained that two of them were exhibiting the horn hand symbol. He identified the individuals in the picture as Darnell, Arthur Leech, Scott Cline and Andrew Mears, and further explained that Mark Leech, Arthur's brother, was the "self-proclaimed King of Hollywood." Wolfe also identified another photograph that included Arthur Leech "throwing the horns" and Andrew Mears displaying a "black . . . bandana or doo-rag around his right arm." Wolfe explained that gangs adopt specific colors to identify themselves as members of a certain gang and "display their allegiance to the gang," that Hollywood's color is black, and that bandanas are often used to display the color of a gang.

¶5 Wolfe also testified that gang members often bear a tattoo with the name of the gang. Numerous photographs of Hollywood members bearing the Hollywood tattoo, holding guns, and displaying the Hollywood hand symbol were admitted at trial. Gang members often have a nickname, or gang moniker. Wolfe explained that members of Hollywood have such monikers, including Clifton, who has used the names "Real," "Rales," and "Hollywood." Officer Madrid also testified that Clifton's nickname was "Real" or "Rel."

¶6 Relying on Rule 404(b), Ariz. R. Evid., which prohibits the admission of evidence of other acts to show a defendant acted in conformity with a character trait,

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Tattoos. (f) Clothing or colors. (g) Any other indicia of street gang membership." The version of this statute applicable to Clifton is the same in relevant part as the current version. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10.

Clifton argues the trial court committed reversible error by admitting evidence of prior acts to prove that he promoted or assisted a street gang.[3] We review a trial court's evidentiary ruling for an abuse of discretion. *See State Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004). Clifton specifically challenges the admission of the following evidence, all of which involved either himself, or members of Hollywood: a drug sale by Darnell and Andrew Mears to undercover police officers on July 9, 2009; the sale of a sawed-off shotgun by Andrew Mears to undercover police officers on June 23, 2009; the sale of cocaine by Clifton to undercover police officers on June 4, 2009; and a May 2006 traffic stop that resulted in the arrest of Andrew Mears, Jeffrey DeLoach, and Arthur Leech. Clifton argues this evidence was irrelevant and had the potential to mislead the jury into thinking his actions in this case were gang-related, which he asserts would be unfairly prejudicial under Rule 403, Ariz. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). We review the court's rulings on the admission of other-act evidence under Rule 404(b) for an abuse of discretion. *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996). An appellate court will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996).

[3]Clifton joined in Darnell's pretrial motion to preclude the other-acts evidence. The trial court detailed the evidence it deemed admissible, noting it "ha[d] to allow the state to present appropriate evidence that . . . there is a criminal street gang as alleged, or was at the time, and that these individuals [Clifton and Darnell] assisted that gang as alleged."

¶7 We note at the outset that, of the four challenged pieces of evidence, only one was admitted pursuant to Rule 404(b). At trial, the state made clear "the only incident that we're admitting for 404(b) purposes is the July 9th incident. The other incidents the Court previously ruled are admissible with respect to the street gang, and this is what this is about." *See State v. Baldenegro*, 188 Ariz. 10, 15, 932 P.2d 275, 280 (App. 1996) (evidence of gang's criminal activity, including acts of other gang members, provided essential element of proof of criminal street gang). The trial court agreed with the state, and ruled the July 9 drug sale involving Darnell and Andrew Mears was admissible under Rule 404(b) "to show absence of mistake on the part of Darnell Clifton. It also does tend to go toward the issue of whether there was or was not a criminal street gang." *See* Ariz. R. Evid. 404(b) (other act evidence admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). The court further ruled that the June 4 and June 23 incidents "also go to that issue [whether there was a criminal street gang]," and later reaffirmed its ruling that evidence of the May 2006 traffic stop likewise was admissible. The court further explained that it was for the jury to determine whether a criminal street gang existed and whether Clifton participated in it "in some fashion."[4]

¶8 In any event, we find it is not necessary to analyze the evidence under Rule 404(b) because it is intrinsic to the charged offense of assisting a criminal street gang

[4]The court gave the jury an appropriate limiting instruction, explaining in relevant part that evidence of other acts may only be considered either "to show the absence of mistake or mere presence in the charged incident," or "to show the existence of a criminal street gang."

activity. *See State v. Herrera*, 226 Ariz. 59, ¶ 12, 243 P.3d 1041, 1046 (App. 2010) ("Evidence of other acts also may be admitted if the evidence is intrinsic to the charged offense. This ground for admitting other-acts evidence is independent of, and without regard to, Rule 404, the exceptions the rule provides, and an analysis under the rule."). "Other act evidence is intrinsic when 'evidence of the other act and evidence of the crime charged are "inextricably intertwined" or both acts are part of a "single criminal episode" or the other acts were "necessary preliminaries" to the crime charged.'" *State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001), *quoting Dickens*, 187 Ariz. at 18 n.7, 926 P.2d at 485 n.7; *see United States v. Johnson*, 463 F.3d 803, 808 (8th Cir. 2006) (intrinsic evidence "provid[es] the context in which the charged crime occurred"); *cf. State v. Myers*, 117 Ariz. 79, 85, 570 P.2d 1252, 1258 (1977) (other-act evidence admissible when "so interrelated with the crime with which the defendant is presently charged that the jury cannot have a full understanding of the circumstances without such evidence").

¶9 The state did not use the evidence here to improperly suggest Clifton was guilty of the present offenses. Rather, in order to prove Clifton's guilt under § 13-2321(B), it was necessary to show the existence of a criminal street gang, Clifton's association with individuals who were known members of that gang, and that those individuals had engaged in illegal activity. The evidence was intrinsic because it is inextricably intertwined with the crime charged in Count Six and the evidence necessary to prove the enhancement to the drug count. *See Baldenegro*, 188 Ariz. at 15-16, 932 P.2d at 280-81. As such, the challenged evidence was admissible.

¶10 Clifton also argues the trial court improperly admitted evidence "about a rap song called 'Snitches Get Sti[t]ches' that was sung by Darnell Clifton on his MySpace website." At trial, the state asserted it was "clear" the song was autobiographical as to Darnell, and that it constituted a threat against a "snitch" named Timothy Gunter, one of the state's witnesses in this case. Clifton seems to argue the court incorrectly admitted both the song and evidence about it. Although the court found the song admissible, it ruled it could not be used to show a threat directed at Gunter. However, as the state has pointed out in its answering brief, it does not appear the song was played for the jury, nor has Clifton directed us to any place in the record showing that it was. Therefore, to the extent Clifton seems to argue the admission of the song prejudiced him, we decline to address that argument. To the extent Clifton maintains that reference to the song prejudiced him because it was presented in a case alleging that "Appellant was involved with a group that was a criminal street gang," he misunderstands the difference between relevant inculpatory evidence and improperly prejudicial evidence. Here, the song, "Snitches Get Stitches," was relevant precisely because its title suggested that its author had the mentality of a criminal street gang member—in a case where the state had the task of proving as a threshold matter that this group of individuals, of which Darnell Clifton was one—acted as such.

¶11 Clifton additionally argues, in any event, the other-act evidence generally was insufficient to support any claim he assisted in street gang activity. He contends there was "no evidence" he associated with Hollywood members "to any extent," and

that, because he was employed by a cleaning company, "[h]is conduct is inconsistent with gang membership."

¶12 "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is proof that "'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). Evidence sufficient to support a conviction can be direct or circumstantial. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. And we will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶13 Based on the direct and circumstantial evidence set forth in detail above, and the reasonable inferences from that evidence, the jury reasonably could conclude Hollywood was a criminal street gang whose members committed felonies jointly and individually on behalf of the gang, and that Clifton possessed a narcotic drug for sale "for the benefit of, at the direction of or in association with" members of Hollywood. *See* § 13-2321(B); *see also State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (jury weighs evidence and determines credibility of witnesses). Accordingly, there is not a "'complete absence of probative facts'" to support the convictions. *Carlisle*, 198 Ariz.

203, ¶ 11, 8 P.3d at 394, *quoting Mauro*, 159 Ariz. at 206, 766 P.2d at 79. Construing all reasonable inferences raised by the evidence against Clifton, *see State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005), we conclude there was ample evidence to support his conviction on Count Six and the enhancement to the drug conviction.

¶14 For all of the aforementioned reasons, we affirm Clifton's convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge